

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 30, 2006 Session

**SARAH SLOAN, Individually and as Surviving Spouse and Next of Kin of
Ben C. Sloan**

v.

NATIONAL HEALTHCORP, L.P., et al.

**An Appeal from the Circuit Court for Robertson County
No. 10606 Ross H. Hicks, Circuit Judge**

No. M2005-01273-COA-R3-CV - Filed on August 30, 2006

This is an arbitration dispute. The plaintiff's deceased husband had been a resident at the defendant nursing home. The plaintiff, individually and as a surviving spouse, filed a tort and wrongful death lawsuit against the defendant nursing home. The answer filed by the defendant nursing home company asserted that the plaintiff's claims were subject to binding arbitration. The answer also included a demand for a jury. After engaging in four months of discovery, the defendants filed a motion to compel arbitration. The trial court denied this motion, ruling that the defendants could not, pursuant to Rule 38 of the Tennessee Rules of Civil Procedure, withdraw their jury demand without the consent of the plaintiff and were therefore precluded from seeking arbitration. The defendants appeal this order. We reverse, holding that a defendant may assert that a dispute must be arbitrated and, in the alternative, demand a jury, without losing its right to arbitration.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Reversed and Remanded

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, J., and DONALD P. HARRIS, SR. J., joined.

John B. Curtis, Jr., and Bruce D. Gill, Chattanooga, Tennessee, for Defendants/Appellants National Healthcorp, L.P., et al.

Brian G. Brooks and Richard E. Circeo, Nashville, Tennessee, for Plaintiff/Appellee Sarah Sloan.

OPINION

With power of attorney, Plaintiff/Appellee Sarah Sloan ("Plaintiff") signed an Admission and Financial Contract ("Admission Contract") to admit her husband, Ben C. Sloan ("Decedent"), to the NHC Healthcare/Springfield nursing home in Springfield, Tennessee, on March 20, 2003. The Decedent lived at NHC Healthcare/Springfield until July 12, 2003. On July 12, 2003, the Decedent was transferred to Northcrest Medical Center, where he died the same day.

On July 12, 2004, the Plaintiff, individually and as the surviving spouse of the Decedent, filed a lawsuit against National Healthcorp, L.P., National Healthcare, L.P., National Health Realty, Inc., National Health Corporation, National Healthcare Corporation, NHC, Inc., NHC/OP, L.P., NHC Healthcare/Springfield, L.L.C. d/b/a NHC Healthcare/Springfield, and John Does 1 through 10 (collectively, "Defendants") in the Robertson County Circuit Court, seeking damages for injuries suffered by the Decedent while he lived at the Defendants' nursing home. The complaint alleged numerous physical and mental injuries, including: repeated falls, lacerations, skin tears, abrasions, wound infection, a fractured finger, DVT, pressure ulcers, strangulation, mental anguish, and death. The claims in the complaint were based on negligence; gross negligence, willful, wanton, reckless, malicious and/or intentional conduct; violation of the Tennessee Nursing Home Residents Rights Act; negligence under Tennessee's Medical Malpractice Act; violation of the Tennessee Adult Protection Act; wrongful death; and breach of fiduciary duty. The Plaintiff sought compensatory and punitive damages, as well as attorney's fees and costs. Finally, the complaint included a jury demand.

On September 9, 2004, the Defendants filed their answer. In the answer, the Defendants denied liability and asserted twelve defenses. The Defendants also noted a dispute-resolution provision included in the Admission Contract signed by the Plaintiff when the Decedent entered the nursing home, and asserted that the Plaintiff's claim should have been submitted to binding arbitration. Accordingly, the Defendants stated, the pending litigation should be stayed and arbitration compelled pursuant to Tennessee Code Annotated sections 29-5-303 and 29-5-317. The answer also included a jury demand.

Discovery ensued. Four months later, on January 18, 2005, the Defendants filed a motion to stay the proceedings and compel arbitration. In their motion, the Defendants relied on the dispute resolution provision in the Admission Contract, signed by the Plaintiff on the Decedent's behalf. The dispute resolution provision stated:

3. BINDING ARBITRATION: Any claim, controversy, dispute or disagreement initiated by either party prior to written notice of mediation, shall be resolved by binding arbitration administered by either the American Arbitration Association (AAA) or the American Health Lawyers Association (AHLA), as selected by the party requesting arbitration. In the event that the selected arbitration service is unwilling or unable to serve as arbitrator, the other named service shall be utilized. The judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

* * *

By agreeing to arbitration of all disputes, both parties are waiving a jury trial for all contract, tort, statutory, regulatory, and other claims.

The parties agree that this Agreement to Arbitrate shall survive and not otherwise be revoked by the death or incompetency of [the Decedent].

(bold in original). This provision of the Admission Contract was signed and dated by both the Plaintiff and Robert Sloan, the Decedent's son.

In response to the Defendants' motion to compel arbitration and stay proceedings, the Plaintiff filed a motion to strike on March 2, 2005. Relying, in part, on the provision in the Admission Contract providing that "both parties are waiving a jury trial for all contract, tort, statutory, regulatory, and other claims," the Plaintiff argued that the Defendants waived the right to enforce the arbitration agreement by engaging in four months of discovery.

The trial court held a hearing on the motion to compel on March 23, 2005. At the conclusion of the hearing, the trial court issued the following ruling from the bench:

This Court firmly supports alternative dispute resolution, and I think it is public policy and it's a reflection of legislative action both at the State and Federal levels that an alternative dispute resolution, including arbitration, is a favored preferred method for disposing disputes between various parties.

That is premise[d] upon the parties who are entering into such agreements doing so on an informe[d] basis, doing so on a basis of having equal bargaining power, and I have serious doubts that such equal bargaining power could ever exist in the context of a nursing home admission, particularly under circumstances where a patient is being transferred from a hospital to the nursing home where the choice presented to the patient's family is get them out of the hospital and get them home or get them in the first nursing home bed that becomes available.

So to make myself clear, if we could engage in weeks of discovery and you could come back here and we could have three days of argument or proof—it's difficult for me to envision a circumstance in which the defendants could satisfactorily show that this agreement, so called agreement, is enforceable.

But it's not necessary for us to go to—in this case the defendants have filed an answer, and much likely the contract in question somewhere within the bowels of the answer—I had to search for it to find it. It is on the second page. It's the third defense—they assert this arbitration clause. And then we go through another several pages and I wind up in No. 13 in the answer to 13 in the agreement, and at the end we ask for a jury of 12 to try the issue. It seems really to a certain extent that they made an arbitration clause that a jury trial be issued.

But whether that's the case or not, they've asked for a jury trial. They've waived any right now to come back and claim otherwise, and if they're going to pursue the arbitration agreement, they participated in discovery, again, indicating an intent to proceed to a jury trial.

But once they asked for that jury trial and plaintiffs had done the same thing, only the jury trial can be dispensed with only with the agreement of both parties, and the plaintiffs have made it abundantly clear they're not going to agree to that. The defense has asked for a jury trial and they're going to get one. The motion to strike

is denied. The motion to compel arbitration and stay is also denied. If you'll prepare the order, please.

This oral ruling was copied, verbatim, into a final order, entered on April 20, 2005. Subsequently, on May 18, 2005, the Defendants filed their notice of appeal.

On appeal, the Defendants raise two issues for review by this Court: (1) whether the trial court erred in denying the Defendants' motion to compel arbitration and stay proceedings on the ground that the arbitration clause was unenforceable; and (2) whether the trial court erred in finding that the Defendants waived their right to enforce the arbitration agreement by including a jury demand in the answer and by participating in written discovery.¹

This Court reviews the trial court's findings of fact *de novo* upon the record, according those findings a presumption of correctness, unless the preponderance of the evidence demonstrates otherwise. Tenn. R. App. P. 13(d); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 356 (Tenn. Ct. App. 2001) (citing *Brooks v. Brooks*, 992 S.W.2d 403, 404 (Tenn. 1999)). We review the trial court's legal conclusions *de novo*, with no presumption of correctness. *Pyburn*, 63 S.W.3d at 356 (citing *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999)).

At the outset of our analysis, we note the well-developed policy favoring arbitration, including a "heavy presumption of arbitrability" under federal law. *See Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996). In an effort to overcome the historical judicial reluctance to enforce arbitration agreements, the Federal Arbitration Act provides that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2005); *see Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995). The Federal Arbitration Act establishes a pro-arbitration policy, and federal law indicates that any doubts as to the arbitrability of a dispute should be resolved in favor of arbitration. *Am. Recovery Corp.*, 96 F.3d at 92. Nevertheless, the federal presumption favoring arbitration is not absolute, and can be overcome by a showing that the party seeking to enforce an arbitration agreement has waived his right to do so. *See, e.g., Chapman v. H&R Block Mortgage Corp.*, No. E2005-00082-COA-R3-CV, 2005 WL 3159774 (Tenn. Ct. App. Nov. 28, 2005). However, "[c]onsistent with public policy in favor of arbitration, there is a generally recognized presumption against waiver." *Id.* at *12 (citing *J. Wise Smith and Assocs., Inc. v. Nationwide Mut. Ins. Co.*, 925 F. Supp. 2d 528, 530-31 (W.D. Tenn. 2003)). Accordingly, the party seeking to prove waiver

¹We note that the trial court, to some extent, apparently considered the Defendants' participation in four months of discovery—which bears only on whether the Defendants waived their right to arbitrate—in holding that they could not withdraw the earlier jury demand. The parties briefed and argued the issue of waiver based on the Defendants' participation in discovery, but the trial court stopped short of ruling on the issue, focusing instead on the operation of the jury demand under Rule 38 of the Tennessee Rules of Civil Procedure. For that reason, we will not address it other than to observe that the Plaintiff, at oral argument on appeal, conceded that the four months of discovery would not be sufficient to constitute a waiver under Tennessee case law.

of an arbitration agreement carries a heavy burden of proof. *Id.* at *12. The party asserting waiver must show that the defendants knew of the right to arbitrate, acted inconsistently with it, and prejudiced the plaintiffs in doing so. *Id.* at *12 (citing *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 724 (9th Cir. 2000)); see *Miller Brewing Co. v. Fort Worth Distrib. Co., Inc.*, 781 F.2d 494, 497 (5th Cir. 1986) (“Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.”). Any doubt as to whether a party has waived the right to assert the arbitration agreement should be resolved in favor of arbitration. *Chapman*, 2005 WL 3159774, at *12 (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). With these considerations in mind, we address the Defendants’ assertions of error by the trial court.

The Defendants first argue in their appellate brief that the trial court erred in denying the Defendants’ motion to compel arbitration and stay the proceedings on the ground that the arbitration provision of the Contract was unenforceable. The Defendants commit considerable time and energy in their appellate brief arguing that the arbitration agreement is not unconscionable. However, from our review of the trial court’s ruling, it was clearly based on the Defendants’ jury demand and not the enforceability of the agreement to arbitrate. At oral argument before this Court, the Defendants conceded as much, but maintain that appellate review of this issue is necessary because the trial court’s comment that the agreement would likely be unenforceable “clearly portends the Trial Court’s ultimate ruling on the arbitration agreement should this Court reverse on the waiver grounds alone.”

Regardless of the trial judge’s remark, this issue is not justiciable at this time. “The courts will decline to act in cases where there is no need for the court to act or where the refusal to act will not prevent the parties from raising the issue at a more appropriate time.” *Martin v. Washmaster Auto Ctr., Inc.*, No. 01-A-01-9305-CV00224, 1993 WL 241315, at *2 (Tenn. Ct. App. July 2, 1993). Indeed, the trial court implicitly acknowledged in its comments that additional evidence is necessary on the issue of formation of the Admission Contract. Without the benefit of a well-developed record, it would be premature for this Court to rule on the enforceability of the arbitration agreement and inappropriate to suggest the appropriate outcome on this issue. Moreover, the trial court did not rule on this issue. Because the issue is not ripe for appeal, and because the trial court did not base its ruling on the enforceability of the arbitration provision, we decline to address this issue on appeal.

The Defendants also argue on appeal that the trial court erred in holding that the Defendants in essence waived their right to enforce the arbitration agreement by including a jury demand in their answer. The Defendants argue that they simply engaged in alternative pleading, asserting the arbitrability of the dispute while simultaneously demanding a jury. In response, the Plaintiff argues that the right to a jury is inviolable, and under Rule 38 of the Tennessee Rules of Civil Procedure, once the Defendants demanded a jury, they were barred from seeking arbitration unless the Plaintiff consented to the withdrawal of the jury demand.

Rule 38.05 of the Tennessee Rules of Civil Procedure provides:

The failure of a party to make demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury as herein provided may not be withdrawn without the consent of all parties as to whom issues have been joined.

Tenn. R. Civ. P. 38.05. Here, it is undisputed that the Plaintiff did not consent to the withdrawal of the Defendants' jury demand. *See generally Beal v. Doe*, 987 S.W.2d 41, 47 (Tenn. Ct. App. 1998) (explaining that the consent of the parties to the withdrawal of a jury demand can be either express or implied). The trial court held that, without the Plaintiff's consent, the Defendants were unable to "withdraw" their jury demand and therefore unable to enforce the arbitration agreement. The question for this Court then becomes whether a jury demand, made simultaneously with a demand for arbitration, renders the demand for arbitration unenforceable absent consent by the Plaintiff.

The parties have cited no helpful caselaw on this issue, and indeed this Court has found a dearth of legal authority instructive on the relationship between Rule 38 and a defendant's initial assertion of both the right to enforce an arbitration agreement and, in the alternative, a demand for a jury trial. Nevertheless, in considering the arguments, we note that the Plaintiff's interpretation of Rule 38, taken to its logical conclusion, would preclude the Defendants from asserting a Rule 56 motion for summary judgment or a Rule 50 motion for a directed verdict, absent the consent of all parties. Clearly, this result would be unacceptable. Moreover, the Plaintiff's position is not consonant with the long-established policy in Tennessee supporting parties' right to plead in the alternative. Tenn. R. Civ. P. 8.01; *see, e.g., Concrete Spaces, Inc. v. Snyder*, 2 S.W.3d 901, 906 (Tenn. 1999).

When the Defendants filed their answer, they had no way of knowing whether the arbitration provision would ultimately prove to be unenforceable. Rule 38 should not be interpreted in a way that forces the Defendants to give up their right to demand a jury in the event that the matter is not arbitrated for any reason. Consequently, we hold that a defendant may assert a contractual arbitration provision and, in the alternative, demand a jury trial in its initial answer, without running afoul of Rule 38.05 of the Tennessee Rules of Civil Procedure.

The decision of the trial court is reversed, and the case is remanded for further proceedings consistent with this Opinion. The costs of this appeal are assessed against Plaintiff/Appellee Sarah Sloan for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE